APPELLATE CIVIL.

Before Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF ASHGHAR REZA AND ANOTHER. 1889

ASHGHAR REZA AND ANOTHER (A MINOR, THROUGH HIS NEXT FRIEND J. H. LEWIS) (PLAINTIFFS) *v.* HYDER REZA AND OTHERS (DEFENDANTS).* *February* 20.

Appeal to Privy Council—Concurrence of two Courts on facts—"Affirming" judgment of Lower Court—Civil Procedure Code (Act XIV of 1882), s. 596—Substantial questions of law—Case disposed of on facts.

Where the issues in a case involved questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact, sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favor of the plaintiff, but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him on all his findings or in the reasons on which they were based :

Held, on an application for leave to appeal to the Privy Council, that the High Court did not "affirm" the judgment of the Lower Court within the meaning of s. 596 of the Civil Procedure Code.

Held, also, assuming the judgment of the Lower Court was affirmed by the High Court, that there were substantial questions of law in the case which entitled the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case.

THIS was an application for leave to appeal to the Privy Council from a decision of the High Court (NORRIS and BEVERLEY, JJ.), dated 26th May 1888.

The plaintiffs in the suit were Syed Ashghar Reza and Syed Dilawur Reza, two of the sons of one Raja Ahmed Reza by his wife Rani Roushan Jehan, and the suit was brought, to recover possession of a share of certain property, against Syed Hyder Reza and Syed Sufdar Reza, the sons, and Muni Bibi, the daughter, of Raja Syed Ahmed Reza by another wife Rani Afzulunnissa, (who died in 1860), and also against Syed Lutf Ali Khan, to whom the other defendants had transferred the property claimed.

The subject of the suit was a share of 11 gundas of zemindari Surjapore which was purchased at a sale in execution of a decree

* Application No. 21 of 1888 for leave to appeal to Her Majesty in Council.

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in the name of one Kasim Ali in February 1851 ; and a share of a putni mehal called Bhata Bhaugulpore which was purchased in 1867 in the names of the defendants Hyder Reza and Sufdar Reza. As to these properties the plaintiffs alleged that the 11 gundas share of the zemindari was purchased by and with the money of Ahmed Reza in the name of Kasim Ali, who was a servant of his, and that Kasim Ali subsequently, in 1854, executed an ikrarnama as to his purchase in favour of Ahmed Reza, though in the name of his wife Afzulunnissa ; and as to the share of the putni mehal, that it had been similarly purchased by Ahmed Reza with his own money in the names of Hyder Reza and Sufdar Reza. The plaintiffs, therefore, claimed these properties as heirs of Ahmed Reza, who died in May 1870, and also claimed to have set aside certain mortgages and deeds of sale executed by Hyder Reza and Sufdar Reza in favour of the defendant Lutf Ali Khan.

The suit was valued at Rs. 4,70,811-14 annas. The defence (the defendant Lutf Ali Khan alone putting in a written statement and defending the suit) mainly was that the purchase of the 11 gundas share of Surjapore was made by Kasim Ali for Afzulunnissa, in whose favour the ikrarnama was executed by him, in 1852, whereby he acknowledged that he had purchased the share for her and with her money ; and that the share of the putni mehal was purchased, not by Ahmed Reza benami, but by the defendants Hyder Reza and Sufdar Reza for themselves and in their own names ; and that even if the properties had been acquired by and with the money of Ahmed Reza, he had intended them to be and had given them for the benefit of Afzulunnissa and Hyder Reza and Sufdar Reza, respectively, and the beneficial enjoyment of those properties had been with those persons, and not with Ahmed Reza. Other defences were raised which are shown by the following issues, which were those settled at the hearing before the Subordinate Judge :—

"(1) Whether the claim of the plaintiffs, or any portion of it, is barred by limitation or not?

"(2) Whether Ahmed Reza purchased the disputed 11 gundas of zemindari Surjapore furzi in the name of Kasim Ali and got Kasim to execute an ikrarnama to him in the name of Afzulunnissa, and the disputed 7 annas and 9 gundas share of putni

taluk Bhata Bhaugulpore, &c., furzi in the names of Hyder Reza and Sufdar Reza or not?

"(3) If the purchases were benami, whether they were made for, and the properties were gifts to, Afzulunnissa, Hyder Reza and Sufdar Reza or not?

"(4) Whether the defendant Lutf Ali Khan is *bonâ fide* a mortgagee and purchaser after due enquiry for value or not?

"(5) Whether Ahmed Reza admitted the title of Afzulunnissa, Hyder, and Sufdar, and put in the petition mentioned in paragraph 9 of the written statement, and whether the statements regarding collection of rent in paragraph 10, the admission of Roushan Jehan mentioned in paragraph 15, and the purchases by the plaintiffs spoken of in paragraph 13 are true? If so, under what circumstances were they made, and are the plaintiffs estopped thereby from maintaining the suit?

"(6) Did Roushan Jehan and Hamidunnissa *alias* Muni Bibi relinquish their shares?

"(7) What shares have the plaintiffs received on the death of their father, and to what shares in the properties are they entitled?

"(8) Are the plaintiffs entitled to mesne profits? If so, to what, and for what period, and from whom?

"(9) Whether the suit is maintainable under s. 317 of the Civil Procedure Code."

The Subordinate Judge, after holding that the suit was not barred by lapse of time, found that the 11 gundas share of Surjapore was purchased by and with the money of Ahmed Reza in the name of Kasim Ali, who was his *karpurdaz* and servant; that the transfer by the ikrarnama was intended to be for the benefit of Afzulunnissa, and operated as a gift to her of that property, of which thenceforth she had the beneficial enjoyment; that the purchase of the share of the putni mehal was made by Ahmed Reza with his own money, but with the intention of providing for, and as a gift for, the benefit of Hyder Reza and Sufdar Reza; that that share was not for a period of more than 12 years after Ahmed Reza's death considered by his heirs to be part of his heritage, but was property of which Hyder Reza and Sufdar Reza and not Ahmed Reza were in beneficial enjoyment

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from the time of the purchase. In consequence of these findings on the 2nd and 3rd issues, the Subordinate Judge considered that the decision of the other issues was unnecessary, and dismissed the suit.

The plaintiffs appealed to the High Court, valuing their appeal at the same amount as the original suit.

The High Court, on appeal, agreed with the Subordinate Judge in finding that the purchase of the 11 gundas of Surjapore was originally a benami transaction, that is, a purchase by Ahmed Reza with his own money in the name of Kasim Ali, his servant; but they were of opinion that it was not purchased on behalf of or for the benefit of Afzulunnissa, and that when it was transferred into the name of Afzulunnissa by the ikrarnama, it was simply a transfer from one benamidar to another; but that at some time before her death, probably at the time of his marriage with Roushan Jehan in 1859, Ahmed Reza made a gift of that property to, and afterwards treated it as being the exclusive property of, Afzulunnissa and her sons Hyder Reza and Sufdar Reza, the beneficial enjoyment of it up to that time having continued with Ahmed Reza. With regard to the purchase of the share of the putni mehal, the High Court held that it was made by Ahmed with money borrowed by him for that purpose, and was intended to enure for the exclusive benefit of Hyder and Sufdar Reza. They summed up their conclusion as follows:—

"Our conclusion, therefore, upon the whole case is much the same as that arrived at by the Subordinate Judge, though we may not agree with him upon each and every one of his findings, or in all the reasons upon which they are based. We find, however, that the 11 gundas zemindari, though originally acquired by Ahmed Reza, was given by him to Afzulunnissa or her sons in or about the year 1859, and was thenceforward acknowledged and dealt with by him as their property. We find further that the putni was acquired by him for Hyder and Sufdar, and was always treated as their exclusive property. That being so, the plaintiffs can have no right or interest in either of these properties as the heirs of Ahmed Reza, and we think that their suit was rightly dismissed.

"Under these circumstances, it seems unnecessary to go into

the other questions that were argued before us with great ability and at considerable length. Our finding being that the plaintiffs had no title, it becomes immaterial to consider whether or not the respondent made due enquiry into their claim, or what may be the shares to which they are entitled, or to what extent the respondent is liable for mesne profits.

"It might have been contended that upon our finding that the 11 gundas zemindari was given to Afzulunnissa in 1859 or 1860, the plaintiffs would be entitled to recover in this suit two-thirds of the share in that property (admittedly a one-fourth share) which would have devolved upon her husband Ahmed at the time of her death. We have accordingly heard Counsel upon this point; and on a full consideration of the arguments advanced, we are of opinion that the plaintiffs are not entitled to any relief on this ground. In the first place we think that they ought not to be allowed to take advantage of a new case, which not only was not put forward by them in their plaint, but which is wholly inconsistent with the case therein disclosed. In the case of *Eshan Chunder Singh* v. *Shama Churn Bhutto* (1), as well as in many other cases, their Lordships of the Privy Council have pointed out the absolute necessity that 'the determinations in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.' Now the plaintiffs came into Court upon the allegation that the properties claimed were exclusively the properties of their father Ahmed at the time of his death. They distinctly denied that Afzulunnissa or her sons had any beneficiary interest in them during Ahmed's lifetime. This title they have failed to prove. The finding of this Court, as of the Lower Court, is that the properties in suit were not the properties of Ahmed, but of Afzulunnissa or her sons. This being so, we think they cannot be allowed to turn round now and set up another quite different title, *viz.*, a title through Ahmed as one of Afzulunnissa's heirs. They denied that Afzulunnissa ever had any title to the 11 gundas, and they cannot now take advantage of the finding that the title was in her to set up an entirely new case, and in point of fact, not-

(1) 11 Moore's I. A., 7.

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withstanding the finding of the Lower Court, we do not find that this new case was even foreshadowed in the memorandum of appeal."

The grounds set forth in the petition for leave to appeal were mainly that the defendants should not have been allowed to set up and to succeed upon a case, *viz.*, the gift by Ahmed Reza to Afzulunnissa, not put forward by them in their written statement, nor made one of the issues in the suit; that the alleged gift, if made, was invalid under the Mahomedan law; that documentary evidence—among other documents a plaint in another suit—had been admitted which was not legally admissible in evidence.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *R. E. Twidale*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Nilakant Sahai*, and Baboo *Saligram Singh* for the petitioners.

The *Advocate-General* (Sir *G. C. Paul*) Mr. *C. Gregory*, Mr. *M. L. Sandel*, Munshi *Mahomed Yusoof* and Baboo *Karuna Sindhu Mukerji*, opposed the petition.

The contention on behalf of the petitioners was that, though both Courts had found against the petitioners on certain issues of fact, the Courts did not agree on the facts which they respectively found against the petitioners, and, therefore, though both Courts came to the same conclusion, the High Court could not be said to have affirmed the decree of the Lower Court within the meaning of s. 596 of the Civil Procedure Code. Even, however, if the High Court could be said to have affirmed the decree of the Subordinate Judge, yet there were substantial issues of law raised in the case which would entitle the petitioners to an appeal under that section. The case of *Gopinath Birbar* v. *Goluck Chunder Bose*, decided by Garth, C.J., and Prinsep, J., on 9th August 1884 (1) was referred to in support of the application. The valuation of the appeal was admittedly sufficient.

(1) *Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Prinsep.*
GOPINATH BIRBAR (APPELLANT) *v.* GOLUCK CHUNDER BOSE AND OTHERS (RESPONDENTS).*

Appeal to Privy Council—Decision of two Courts on facts in case in which are issues of fact and law—Right of appeal—Civil Procedure Code (Act XIV of 1882), *s.* 596—*Review of order granting leave to appeal.*

Where the issues in a case involved points both of law and fact, and the first Court having decided these issues against the plaintiff and dismissed the suit, the

* Application for appeal to Privy Council, No. 19 of 1884.

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The petition was opposed mainly on the ground that, inasmuch as the petitioners sued for a share of certain property by inheritance from Ahmed Reza, and both the Subordinate Judge and the High Court had held on the evidence that they could

High Court agreed with the finding of the first Court on the first issue, which was one of fact sufficient for the disposal of the case, and gave no decision on the other issues:

Held, on an application for leave to appeal to the Privy Council, that the plaintiff was, under the last clause of s. 596 of the Civil Procedure Code, entitled to appeal, such an appeal involving questions of law within the meaning of that section, notwithstanding that such questions might be immaterial for the decision of the case.

Per PRINSEP, J.—An order granting leave to appeal to the Privy Council is open to review.

THIS was a re-hearing of an application for leave to appeal to the Privy Council.

The application was originally made to PRINSEP, J., sitting as Judge in the Privy Council Department, and granted by him. An application for review of the order granting leave to appeal was made to PRINSEP, J., and opposed on the ground that such an order was not open to review. On that application PRINSEP, J., said:—

"This is an application for review of my order granting a certificate to the opposite party to appeal to the Privy Council. It is contended that such an order is final, and not open to review. The only reported case on the subject is that of *Ameerunnessa Begum* v. *Inderjeet Koonwar* (1), and both parties claim that judgment as a precedent in their favour. The facts are not sufficiently stated in the judgment for me to regard that case as a precedent.

"No sufficient reason occurs to me for refusing to exercise this power of reviewing my previous order. It would seem rather from the position which the Chapter of the Code regarding appeals to the Queen in Council occupies with regard to reviews of judgments that the Legislature contemplated that the latter should apply to such appeals. As *primâ facie* there are good grounds for reconsidering the points involved, I grant the application for review."

The application for leave to appeal was heard by GARTH, C.J., and PRINSEP, J., and in the judgment delivered on that re-hearing by GARTH, C.J., the facts are for this report sufficiently stated.

Mr. *R. E. Twidale* and Baboo *Abinash Chunder Banerjee* for the appellant.

Baboo *Chunder Madhub Ghose*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Karuna Sindhu Mookerjee* for the respondents.

GARTH, C.J.—This is a rehearing of an application made to Mr. Justice Prinsep in the Privy Council Department.

(1) 5 W. R., Mis. 97.

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not succeed, because the property in which they sought to share did not belong to Ahmed Reza at his death, that was such a concurrent finding on the facts and affirmance of the Subordinate Judge's decision by the High Court, as precluded the petitioners

The suit was brought by the plaintiff, claiming to be the son and heir of Rajah Ram Chunder Munraj Mohapatter. The case was an important one, and the value of the subject-matter of the suit was far beyond Rs. 10,000.

The main issues raised were as follows :—

"Is the plaintiff the son of Rajah Ram Chunder Munraj Mohapatter and by what wife?

"Was there anything in the way that Rajah Ram Chunder Munraj Mohapatter succeeded his predecessor tending to make the Rajgi to be regarded as self-acquired property for the purposes of this litigation?

"Does the Mitakshara law apply, and, if not, what law?

"Does the Pachis Sewal apply, and, if so, how, and to what extent?

"Was the alienation for necessary reasons?

"Were defendants 1 and 2 innocent purchasers as alleged?

"Was the sale valid: can it be set aside?" So that they admittedly involve points of fact and law.

The first Court decided these issues against the plaintiff, and dismissed the suit. On appeal to the High Court the learned Judges of the Division Bench agreed with the first Court on the question raised by the first issue; namely, whether the plaintiff was really the son of the Rajah? Having decided this question of fact against the plaintiff, they dismissed the appeal, giving no decision upon the other issues.

The plaintiff then applied to Mr. Justice Prinsep, as the Judge of the Privy Council Department, for leave to appeal to Her Majesty in Council. The application was opposed upon the ground that the decision of both Courts upon the question of fact was fatal to the plaintiff's case; and that there was, therefore, no appeal to the Privy Council, having regard to the last paragraph of s. 596 of the Code.

My brother Prinsep however decided that, as the appeal involved questions of law as well as of fact, he ought to allow it; and he was confirmed in that view by a decision of Mr. Justice PONTIFEX in the case of *Moran* v. *Mittu Bibee* (1).

The defendants applied for a review, and simultaneously appealed against this order. Mr. Justice PRINSEP admitted the application for a review, and the defendant having withdrawn his appeal the matter has been re-heard.

Although we are by no means clear what the intention of the Legislature was, we think that, having regard to the language of s. 596, we ought to allow the appeal. It has been contended that the true meaning of the section is, that if the two Lower Courts have decided some question of

(1) I. L. R., 2 Calc., 228.

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from appealing. With such a final decision on the facts, any question of law became immaterial.

The following judgment was delivered by

GHOSE, J.—This is an application for leave to appeal to Her Majesty in Council. The value of the subject-matter of the suit is far above ten thousand rupees, and the case seems to be an important one.

The suit out of which this appeal arises was one brought by Syed Ashghar Reza and Syed Dilawar Reza, as heirs of one Syed

fact against the plaintiff which is essential to his right to maintain the suit, no appeal lies to the Privy Council, although, if the appeal were preferred, it would involve questions of law, besides the question of fact. In other words, that unless in such a case the appeal to the Privy Council *necessarily* depends upon some question of law, it ought not to be admitted.

We think it very possible that this may have been the intention of the Legislature ; and that their Lordships of the Privy Council may put that construction upon the section. But we agree with Mr. Justice Pontifex that this is not *the necessary intendment of the words ;* and that, unless it is so, we think we ought not to deprive the plaintiff of an appeal.

The words of the section are, that " where the decree appealed from affirms the decision of the Court below, the appeal must involve some substantial question of law." Now here, if the appeal is allowed, it will involve substantial questions of law. That is to say, questions of law will be raised in the appeal, as well as the question of fact. It is true, that those questions of law may become immaterial, if the question of fact is decided against the plaintiff ; but still it seems impossible to say that the appeal does not involve questions of law.

It is argued that, as the High Court have decided the question of fact only, and have declined to decide the questions of law, the lattter questions would not be before the Privy Council on appeal. But those questions are raised by the issues : and it is an admitted fact that upon the appeal the Privy Council would have all the materials before them to enable them todecide the whole case.

We have been referred to a case of *Joymungal Koiri* v. *Mokhun Koiri* (1) decided by the Privy Council as an authority in the defendants' favour. But we find that there the only question raised on appeal was a question of fact. The grounds of appeal involved no question of law at all.

We think, therefore, that the appeal should be allowed, and both parties will then have the opportunity of arguing the point again before their Lordships.

As regards the costs of the application, we think that they should follow the result of the appeal.

(1) 10 C. L. R., 611.

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Ahmed Reza, to recover possession of their share in two properties, one of the properties being an 11 gundas share of a zemindari, and the other, a certain putni mehal. The claim was made as against Syed Hyder Reza and Syed Sufdar Reza, their step brothers, being the sons of Syed Ahmed Reza by another wife Afzulunnissa, and as against Syed Lutf Ali Khan who has derived his title under a sale from those two individuals.

As to the first-mentioned property, namely, 11 gundas of the zemindari, it appears that it was purchased at an execution sale in the year 1851, in the name of one Kasim Ali, and this individual subsequently executed an ikrarnama bearing date the 21st August 1852, in favour of Afzulunnissa, the mother of Hyder and Sufdar, admitting thereby that the purchase had been made from the money of that lady, and that the property belonged to her.

The plaintiffs' case was that the property had been purchased by Ahmed Reza with his money in the benami of Kasim, and that he, Ahmed, caused Kasim to execute the said ikrarnama in the name of his wife for his own benefit, and that he was in possession, and not Afzulunnissa.

The case on the other side was that the purchase in 1851 by Kasim Ali was a purchase for the benefit of Afzulunnissa and with her money; that it was really transferred to her under the ikrarnama, and that since the purchase she, Afzulunnissa, was in possession, and not Ahmed Reza. A further plea was, however, set up by the defendant, that even supposing that the purchase in 1851 was made with the money of Syed Ahmed Reza, it should be taken to have been a purchase made for the benefit of, or a gift made to, Afzulunnissa and her sons.

In regard to the other property, namely, the putni, it appears that it was purchased in the year 1867 in the names of Syed Hyder Reza and Syed Sufdar Reza. The plaintiffs' case was that it was purchased with the money of Syed Ahmed Reza, and that it belonged to him; whereas the case of the other side was that it was really a purchase made by Syed Sufdar Reza and his brother, through their guardian, but that even if it be the case, that the money with which the purchase was made was money which belonged to

Syed Ahmed Reza, it should be taken that Syed Ahmed Reza intended it to be an acquisition for the benefit of, or as a gift to, Syed Hyder Reza and Syed Sufdar Reza.

The Subordinate Judge held, so far as the first-mentioned property is concerned, that the purchase was made by Syed Ahmed Reza with his own money in the name of his mukhtear, Kasim Ali, and that the ikrarnama, bearing date August 1852, operated as a transfer of the property from Syed Ahmed Reza to his wife Afzulunnissa. He seems to have also found that the beneficial enjoyment of the property in question since the execution of the ikrarnama was with Afzulunnissa, and not with Syed Ahmed Reza.

With regard to the putni the Subordinate Judge held that, although it was purchased with money borrowed by Syed Ahmed Reza, still as he had received various sums of money as profit from the 11 gundas share of the zemindari belonging to Syed Hyder Reza and Syed Sufdar Reza, and as he wanted to make a provision for these two young persons, he made the acquisition for their benefit. He also found that the beneficial enjoyment of this property was with them and not with Syed Ahmed Reza.

The result was that the suit was dismissed.

On appeal to this Court, the learned Judges have agreed with the Subordinate Judge in holding that the purchase of the 11 gundas share of the zemindari in the name of Kasim Ali in 1851 was by Syed Ahmed Reza with his own money, and not by Afzulunnissa; but they have come to a very different conclusion as regards the effect of the ikrarnama of the year 1852. They have held that it did not operate as a transfer from Syed Ahmed Reza to Afzulunnissa, as was held by the Subordinate Judge; but that it was really a transfer from the name of one benamidar to that of another. And as far as I can understand the judgment of this Court, the Judges seem to have also held that, notwithstanding this ikrarnama in favour of Afzulunnissa, the beneficial enjoyment of the property continued to be, as it hitherto was, with Syed Ahmed Reza.

The learned Judges, however, have at the same time held that Syed Ahmed Reza some time in July 1859, when he married the plaintiff's mother Roushan Jehan, conceived the idea of

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making a gift of this property to Afzulunnissa, and this idea was given effect to about that time or shortly before her death, which took place in 1860; and this they have held to be proved by certain transactions of Syed Ahmed Reza in the years 1860, 1863 and 1869.

In regard to the putni the learned Judges seem to have taken pretty nearly the same view as that taken by the Lower Court, although they have not expressed any opinion as to whether Ahmed had any money in his hands belonging to Hyder and Sufdar.

In the result this Court has come to the conclusion, as the Lower Court did, that the plaintiffs are not entitled to recover any one of the two properties in question, and it has accordingly dismissed the appeal preferred by the plaintiffs.

Against the judgment pronounced by this Court the plaintiffs now ask for leave to appeal to Her Majesty in Council; and the first question that arises for consideration is, whether the decree sought to be appealed from affirms the decision of the Court below within the meaning of s. 596 of the Code of Civil Procedure.

The word "decree," as defined in s. 594 of the Code, "includes also judgment and order;" so that I may take it for the purposes of the matter before me, that "decree" means judgment. And the question then is, whether the judgment of this Court affirms the decision of the Subordinate Judge. No doubt it may be taken, as it was argued by the learned Advocate-General, that this Court has concurred with the Subordinate Judge in holding that the property at the time of the death of Syed Ahmed Reza did not belong to him, and that, therefore, the plaintiffs are not entitled to recover any share thereof; but it has come to this conclusion for reasons which to my mind are very different from those given by the Subordinate Judge. The learned Judges have held that the ikrarnama had not the effect of transferring the property from Ahmed Reza to Afzulunnissa; that the latter was but the benamidar for Ahmed; and that, notwithstanding the ikrarnama, the property continued to belong to Ahmed Reza.

If the judgment of this Court had stopped with their decision as regards the two questions upon which the Subordi-

nate Judge decided the case against the plaintiffs, *viz.*, as to the effect of the ikrarnama, and as to possession since that document, the plaintiffs would have been, as I understand it, entitled to recover. But then they go on to decide the case against them upon a totally different ground, *viz.*, that some years after the ikrarnama there was a gift by Ahmed to Afzulunnissa.

I therefore take it that the judgment of this Court does not affirm the decision of the Court below so far as regards the 11 gundas share of the zemindari. And if this is a right view of the matter, the petitioners are entitled to a certificate that the case is a fit one for appeal. But I may also say that the appeal which they present involves substantial questions of law. For instance, a question is raised whether the defendant was entitled to set up in appeal, and succeed upon, a case which he did not raise in the Court of first instance, and which was not involved in the issues raised between the parties. Another question is as regards the validity under Mahomedan law of the gift said to have been made by Syed Ahmed Reza to Afzulunnissa. Then there is the question raised as regards the admissibility of certain important documents, one of these documents being a certified copy of a plaint; and the question in regard to this is whether a plaint is a public document within the meaning of s. 77 of the Evidence Act.

It is not necessary to refer to the other points that are raised in this appeal.

I think upon the whole that the case is a fit one for appeal to Her Majesty in Council, and that it should be certified as such.

Let a certificate be granted accordingly, and the usual notice be issued.

J. V. W. *Application granted.*